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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-357

J. L. SIMMONS COMPANY, INC.,

Petitioner,

v.

LOCAL 742, UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA,

Respondent,

and

NATIONAL LABOR RELATIONS BOARD,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT UNION IN OPPOSITION

QUESTIONS PRESENTED FOR REVIEW

1. May the Board in finding that the Union violated Section 8 (b) (4) (B) of the National Labor Relations Act rely solely upon and automatically apply its "right

to control" doctrine and thus hold, contrary to the factual findings of the Trial Examiner, that the Union was engaged in an illegal product boycott instead of legal primary work preservation activity or is the Board, as the Trial Examiner did, required to examine all the facts and surrounding circumstances in determining the Union's objective?

2. Notwithstanding the Trial Examiner's and Board's finding that the specific work involved was the traditional and the historical bargaining unit work covered under the general provisions of the Union's collective bargaining agreement, must the collective bargaining agreement specifically detail the work in question to avoid a finding of an illegal secondary boycott?

STATEMENT OF THE CASE

J. L. Simmons Company, Inc. ("Simmons") filed unfair labor practice charges against Local 742, United Brotherhood of Carpenters and Joiners of America ("Carpenters" or "Union") alleging the Carpenters had engaged in an illegal secondary boycott in violation of Section 8 (b) (4) (i) and (ii) (B) of the National Labor Relations Act, as amended ("Act"). The General Counsel of the National Labor Relations Board ("Board") subsequently issued a complaint alleging the Carpenters had engaged in an illegal secondary boycott.

As part of its dispute with Simmons, the Carpenters filed unfair labor practice charges against it, claiming that Simmons had violated a settlement agreement of an earlier Board proceeding by discriminating against the Carpenters' steward, attempting to diminish the bargaining unit work (i.e., the work involving the subject matter of Simmons' charge against the Carpenters) without nego-

tiating with the Union. Although the Board's Subregion issued a complaint against the Union, it refused to issue one against Simmons. An appeal by the Union to the Board's General Counsel was technically denied, but not wholly rejected in that the Director of the Office of Appeals held:

> "Further, and apart from other considerations, inasmuch as the 8 (a) (5) portion of the instant charge is the observe of the CC charge filed 5 days earlier on which complaint had issued, and as the Union will be free to urge its position here as a defense in that case, further proceedings with respect to the alleged refusal to bargain were unwarranted."

Consistent with the holding of the Board's Office of Appeals, the Carpenters' answer denied any illegality and affirmatively set forth its charge of a refusal to bargain about the deprivation of traditional bargaining unit work. The Trial Examiner agreed with the Union that it was engaged in legitimate activity protesting the deprivation of traditional bargaining unit work and found the Union not guilty of violating any provision of the Act. He recommended that the complaint be dismissed *in toto*. On appeal, the Board reversed the Trial Examiner. In finding the Union guilty of a secondary boycott violation and reversing the Trial Examiner, the Board nevertheless relied upon the factual findings of the Trial Examiner, but it utilized its "right to control" doctrine which *per se* required ignoring the Union's claim of deprivation of traditional bargaining unit work and required automatically finding a violaton. The Court of Appeals refused to permit the Board to utilize its "right to control" doctrine as a *per se* determinant and

accordingly reversed and remanded the case to the Board to examine all the facts and surrounding circumstances.[1]

Members of the Carpenters were employed by Simmons which had contracted with the Decatur and Macon County Hospital Association to build a new addition to the Macon County Hospital in Decatur, Illinois. As regards the Carpenters work involved on the project the Court of Appeals summarized the facts as follows: "One of the carpenters' duties on the project was to hang new doors. This task might have been expected to provide a good deal of work for union members, for it generally involved not simply hanging but also prior preparation—trimming, routing, mortising and cutting—of the doors. The Board adopted a finding of the trial examiner that such preparatory work was 'historical and traditional unit work of carpenters at the jobsite.' Yet in this case the carpenters were deprived of that part of the task; they were ordered by the Simmons Company to hang premachined doors, prepared at the factory rather than at the job site." (App. 4a-5a).

Simmons contracted to build the addition to the hospital in July of 1966 and the specifications at that time called for wooden doors which would be prepared at the jobsite. The contract gave the Hospital Association the option to require more expensive premachined doors. Subsequently, the Hospital, through its architect's specifications, made the decision to use premachined doors. The Court of Appeals held that "Thus by signing the con-

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1. The Court of Appeals decision is officially reported at 444 F. 2d 895 and unofficially reported at 76 LRRM 2979. A copy of the lower Court's decision is reproduced in the Appendix to the Petition at pages 1a to 18a, thereof. References to the decision will appear herein as "App." followed by the appropriate page number of the Appendix to the Petition.

tract Simmons agreed to install pre-fabricated doors if asked to do so. The Company thereby bound its hands, participating affirmatively in the crucial decision." (App. 5a-6a).

When the Carpenters' business representative learned that the prefabricated doors had arrived on the job site he immediately raised a strong objection to the deprivation of the Carpenters traditional bargaining unit work. The Carpenters objected that the use of premachined doors violated its collective bargaining agreement with Simmons which required Simmons to recognize the traditional and historical jurisdictional work of the Carpenters. The Company requested that the doors be hung; the Carpenter member on the project refused. The doors, manufactured by the Anderson Wood Products Company, were union made, being manufactured and premachined by members of the Carpenters International. The doors bore the Carpenters Union label. In this connection the Court of Appeals found that "There is no indication in the record of this case that the Carpenters' union had any concern with the labor relations of the Hospital Association with *its* employees or of Anderson Wood Products Company with *its* employees." (App. 12a, fn. 13).

Following the initial refusal to hang the doors the Carpenters initiated several attempts to resolve the problem through bargaining with the Company over the loss of bargaining work rather than resort to litigation or continued confrontation. The Carpenter's attorney contacted the Company attorney and suggested that the doors be hung and that the parties negotiate a premium for the lost work because in the construction industry the loss of bargaining unit work translated into loss of earnings. This proposal was communicated by the Car-

penters to the Company on several occasions. The Company gave no response but instead filed the instant unfair labor practice charges against the Carpenters. During the time the Carpenters were attempting to resolve the problem by negotiation, Simmons made two other requests to hang the doors which the Carpenters refused. Ultimately, when it became clear that the Company was unwilling to negotiate, the Carpenters hung the doors. The Carpenters did not engage in any work stoppage or picketing nor did any one walk off the job; rather, the Carpenters on the project merely continued performing other work until the doors were hung. Both the Trial Examiner and the Board found that the temporary refusal of the carpenters to hang the doors did not in any way delay the completion of the project. The Trial Examiner found, based upon all the facts and surrounding circumstances, that no unfair labor practice had been committed under Section 8 (b) (4) (B) of the Act because the Carpenters had no "secondary" cease-doing-business objective as proscribed by said section. The Board reversed, finding a "secondary" objective based solely on its "right to control" test. The Board held that the single controlling and conclusive factor was that Simmons had no immediate "control" over the type of doors to be installed and it concluded that Simmons was thereby a "neutral with respect to the assignment of this work," notwithstanding the fact that Simmons was the employer of the employees involved and had a collective bargaining agreement with the Carpenters which required the recognition of historical and traditional Carpenter bargaining unit work.

The Court of Appeals held that the Board's transformation of Simmons into a "neutral" was "Cinderella-like" and termed it "rather incredible" (App. 9a). The

Court in its footnote 4 (App. 5a) noted that the Board adopted all of the factual determinations of the Trial Examiner, which related to all the facts and the surrounding circumstances, and the only determination of the Board which differed related to the control issue "which the Board concluded was dispositive of the case." The Court further stated in its footnote 4 that the Board "appears to have adopted (the Trial Examiner's finding) regarding traditional unit work . . . and the Board apparently agreed that the union's sole objective was to regain traditional unit work, an objective addressed only to the labor relations of the pressured employer." The Court stated that it would be theoretically possible to simply reverse the Board's decision because of the factual findings of the Trial Examiner which the Board adopted. However, it generously chose to remand the case because of the possibility that "the Board's mistaken focus confined to the question of 'control' may have led it to adopt findings which it may wish to examine more thoroughly when it applies the proper primary-secondary test on remand." (App. 5a, fn. 4). The Court added, in its footnote 8 (App. 9a), that on remand "The Board is free to review its previous acceptance of (the Trial Examiner's fact findings)."

ARGUMENT

Section 8 (b) (4) (B)[2] of the Act makes it illegal for a union to engage in conduct which induces or encourages employees, or threatens, coerces or restrains any employer, where in either case an **object** thereof is to force or require any person to cease doing business with another. It is clear that for a violation to exist, there must be **illegal means** employed for an illegal **object.** One without the other is not prohibited by the Act. Moreover, the proviso to this section specifically states "That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing." And, Section 13 of the Act provides that "Nothing in this Act, **except as specifically provided for herein,** shall be construed so as either to interfere with or impede or diminish in any way the right to strike, or to affect the limitations or qualifica-

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2. The pertinent provisions of Section 8 (b) (4) (B) (29 U.S.C. Sec. 158) are as follows:

"SEC. 8(b) It shall be an unfair labor practice for a labor organization or its agents—

* * * *

(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce to engage in, a strike or a refusal in the course of his employment to use, . . . or otherwise . . . to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce in an industry affecting commerce, where in either case an object thereof is:

* * * *

(B) forcing or requiring any person to cease using, selling, handling, transporting, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, . . . Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing."

tions on that right." (Emphasis supplied). Thus the question is one of balancing the facts in a case against these provisions of the Act: Whether or not illegal means were used for an illegal objective juxtaposed the Union's right to engage in a peaceful primary strike or activity. In the final analysis, a determination of a violation must be concerned with examining the Union's means and testing its objectives. As regards means, here, the Union temporarily refused to hang premachined doors contending that the machining of the doors was bargaining unit work which they had traditionally performed and should continue to do at the job site in an effort to preserve their work. Abandoning its initial refusal, the Union hung the doors, requesting that Simmons negotiate with it concerning some formula wherein the loss of bargaining unit work (the premachining, which translated into loss of earnings) could be regained through negotiating a premium rate of pay for hanging each premachined door. The Union's objective then was designed to preserve work opportunities for the employees immediately involved—it was a primary objective relating solely to the employer who employed the employees—Simmons, and to no one else. It had no dispute with the hospital and the door manufacturer (Anderson) had an agreement with the Carpenters International and its doors bore the Carpenters union label. The premachined doors made by Anderson were, in fact, hung, and the other doors, those which would have been premachined at the job site, were also to be made by Anderson and would similarly have been hung by the Union without objection.

The Trial Examiner, after examining all of the facts and surrounding circumstances, determined that there was no violation of the Act, but rather that the Carpen-

ters were engaged in permitted work preservation activity. As previously discussed, the Court of Appeals noted, in its footnote 4 (App. 5a), that the Board adopted all off the Trial Examiner's fact findings including his finding that the work in question was traditional bargaining unit work. The Court of Appeals chose to remand the case to the Board rather than flatly reverse because it felt the Board's "mistaken focus confined to the question of 'control'" (App. 5a, fn. 4) may have caused the Board to disregard the findings which established the Carpenter's work preservation objective. The Court of Appeals refused to allow the Board to utilize its *per se* automatic doctrine and, after discussing the mistaken theoretical foundation on which the "right to control" doctrine is based, held "The legal effect of the Board's test is to allow an employer to bind his own hands and thereby immunize himself from union pressure occasioned by his employees' loss of work. In one act, the employer helps to create a labor conflict and simultaneously washes his hands of it." (App. 10a). The Court below discussed at length this Court's primary-secondary analysis in *National Woodwork Manufacturers Assn.* v. *NLRB,* 386 U.S. 612 (1967) and stated that although the "right to control" issue was not before this Court in that case "It is quite clear that the two (this Court's decision and the Board's absolute doctrine) are in fundamental conflict" (App. 11a).

The Court of Appeals' rejection of a *per se* automatic finding of guilt is completely in accord with applicable decisions of this Court. In *Local 761, IUE* v. *NLRB,* 366 U.S. 667, 674 (1971) this Court stated that "The nature of the problem [of determining whether a Section 8 (b) (4) (B) violation exists] as revealed by unfolding variant

situations, inevitably involved an evolutionary process for its rational response, not a quick definitive formula as a comprehensive answer." Similarly, in *Local 357, International Brotherhood of Teamsters* v. *NLRB,* 365 U.S. 667 (1961) this Court rejected the Board's then *per se* approach to hiring halls and held that the Board rather than inferring discrimination on a *per se* basis must determine "whether discrimination has in fact been practiced." (pg. 677). In *National Woodwork,* this Court held that the Carpenters Union could refuse to handle premachined doors and could even strike their own employer in order to preserve their bargaining unit work. In the companion case, decided the same day [*Houston Insulation Contractors Association* v. *NLRB,* 386 U.S. 664 (1967)], this Court upheld a union's activities designed to protect its bargaining unit work with its own employer in the preparation, distribution and application of pipe and boiler coverings. In each instance there was a contention that the means and objectives of the union were secondary in that the effect might or would cause the employer with whom the union had a contract to cease doing business with someone else. After analyzing the history of secondary boycotts and the legislative history of Section 8 (b) (4) (B) of the Act, each decision held that the union's objective of work preservation was not only a subject for bargaining made mandatory under Section 8 (a) (5) of the Act, but was also a primary protected objective under Section 8 (b) (4) (B), "The touchstone (being) whether the agreement or its maintenance is addressed to the labor relations of the contracting employer vis-a-vis his own employees." *National Woodwork,* pg. 654. Was the Union's objective, this Court asked, the preservation of work for the employees or was their activity "tactically calculated to satisfy union

objectives elsewhere." *National Woodwork*, pg. 644. If the action was to satisfy the Union's objectives elsewhere rather than its labor relations with the employer then the employer of the employees represented by the Union (here Simmons) would be a "neutral;" otherwise such employer would be the primary and the activity would be protected. Significantly, the *National Woodwork* decision not only held that work preservation was a legitimate permitted objective of a union but it also mandated the Board in determining whether or not an 8 (b) (4) (B) violation existed to examine "all of the surrounding circumstances." (Pg. 644). The Court of Appeals correctly followed the dictates of this Court in holding that the Board's "right to control" doctrine was squarely in conflict with this Court's analysis of the primary-secondary distinction in determining a violation of Section 8 (b) (4) (B).[3]

Now, Simmons, not the Board, seeks certiorari not because the Court of Appeals substantially departed from acceptable judicial proceedings but basically because it wants this Court to reverse itself and "overturn" its deci-

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3. The Petitioner calls the Board's "right to control" test an analytical tool and states that the Board has successfully established other tests for determining the existence of a violation. In this connection, it cites *Sailors Union of the Pacific (Moore Dry dock)*, 92 NLRB 547 (1950) and this Court's decision in *Local 761, IUE* v. *NLRB*, 366 U.S. 667 (1961). *Moore Drydock* establishes a test to determine whether picketing at a common situs is primary or secondary and the *Electrical Workers* case established a test to determine the object of picketing where a gate was reserved for contractors on the premises of an industrial plant. Significantly, however, both tests unlike the "right to control" test, focus not on one single element and make that the sole determinant of a violation but rather they relate to a number of factors regarding the activity not only of the Union but the employer involved as well and in actuality relate to the "surrounding circumstances" as this Court later expressed in *National Woodwork*.

sion in *National Woodwork*. It alludes (and perhaps contends) to a conflict among Circuits. But simply stated, this is untrue.[4] Five Circuits[5] have had occasion to pass

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4. At page 14 of its brief Simmons states that the pre-*National Woodwork* decisions "had sanctioned the test", however a reading of those decisions clearly indicates that the appropriateness of the doctrine was never analyzed on the merits by any of the Circuits prior to *National Woodwork*. Illustratively, in 1960 the Second Circuit in *NLRB* v. *Enterprise Association*, 285 F. 2d 642 enforced a Board order finding a violation of Section 8(b)(4)(B). The Court used terms such as "wholly within the control" of another but it also found that "an abundance of evidence supported the Board's finding" of guilt. The Board had merely adopted the Trial Examiner's findings and conclusions that the union was engaged in a "product boycott" [124 NLRB 521 (1959)]. The Board had not, as yet, developed its "right to control" doctrine. In 1969, the District Court for the Southern District of New York [*Danielson* v. *Painters, District Council No. 20*, 305 F. Supp. 1108, 1115-1116 (S.D. N.Y., 1969)] in rejecting the "right to control" test as an absolute, questioned the vitality of *Enterprise* "inasmuch as the opinion was announced almost a decade ago, even before the Board itself had clearly enunciated its control test, the court itself never explicitly professed to be relying on the test, and the facts of the case would appear to fall well outside the factual framework of the typical 'right to control' case . . .". The Third Circuit in 1964 [*NLRB* v. *ILA, Local 1694*, 331 F. 2d 712], enforced the Board order [137 NLRB 1178] which found a violation because the employer was "without power to resolve the underlying dispute". The Board decision while not using the words "right to control" represented the early beginning of the Board's formulation of the doctrine. Interestingly, in these very early cases, the questions involved were not preservation of bargaining unit work as regards specific work to be performed on the job site (as distinguished from away from the site), but, in the main, were disputed jurisdictional claims normally between two competing unions where the Board held that the particular employer involved did not have control over the assignment of employees. In 1964, the Sixth Circuit [*Carpenters District Council* v. *NLRB* 339 F. 2d 142] approved the Board's doctrine. Simmons points also to two earlier decisions of the lower Court, *Local 636, Plumbers* v. *NLRB*, 278 F. 2d 858 (1960) and *Local 5, Plumbers* v. *NLRB*, 321 F. 2d 366 (1963). The *Local 636* case merely enforced a Board order [123 NLRB 225 (1959)] involving claims of violation which occurred prior to the 1959 enactment of Section 8(e) of the Act and was treated as a routine secondary boycott case [even

upon the doctrine since this Court's decision in *National Woodwork,* and all, in agreement with the lower court here, have held the doctrine to be legally deficient. Two Circuits (the Third and the District of Columbia) had earlier impliedly upheld the doctrine but when the issue was again presented to them, both laid to rest any notion that their prior decisions had approved the Board's automatic test. Both Circuits expressly rejected it.[6] Thus, at

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under the old lettering system—8(b)(4)(A)]. Moreover, the case discussed many facts upon which the Board relied unrelated to its "right to control" doctrine. Most of Board's decision concerned itself with a refusal to refer men and as to whether or not this constituted a strike. Similarly, in *Local 5, Plumbers,* the Court affirmed a 3 to 2 Board decision [137 NLRB 828 (1962)]. Neither the Board nor the Court decision discussed Section 8(e) of the Act and the controversy before the Board was whether or not the case should be treated as an 8(b)(4)(D) violation (jurisdictional dispute). Finally, Simmons points to the Seventh Circuit's decision in the *National Woodwork* case [354 F. 2d 594 (1965)] where that Court affirmed the Board's order relying on *Allen Bradley* v. *Local Union No. 3,* 325 U.S. 797 (1945). an anti-trust case which has been rejected by this Court. In *National Woodwork* this Court noted that the 1947 amendments to the National Labor Relations Act (Taft-Hartley) were passed after the *Allen Bradley* decision and concluded that Congress, having fully discussed the *Allen Bradley* case, intended to grant the right to construction industry unions and their members to protect bargaining unit work.

5. **District of Columbia Circuit,** in addition to the instant case, *Local 636, Plumbers* v. *NLRB,* 430 F. 2d 906 (C.A. D.C., 1970). **First Circuit,** *Beacon Castle Square Building Corp.* v. *NLRB,* 406 F. 2d 188 (C.A. 1, 1969); **Third Circuit,** *NLRB* v. *Local 164, IBEW,* 388 F. 2d 105 (C.A. 3, 1968); **Eighth Circuit,** *American Boiler Manufacturers Association* v. *NLRB,* 404 F. 2d 556 (C.A. 8, 1968); **Ninth Circuit,** *Local 8, Bricklayers* v. *NLRB,* —— F. 2d —— (C.A. 9, July 21, 1971) (77 LRRM 3023).

6. *NLRB* v. *Local 164, IBEW,* 338 F. 2d 105 (C.A. 3, 1968) and *Local 636, Plumbers* v. *NLRB,* 430 F. 2d 906 (C.A. D.C., 1970). Additionally, see fn. 4, *supra* where the Southern District of New York in *Danielson* v. *Painters District Council* expressly rejected the Second Circuit's decision in *Enterprise Association.*

the time of the issuance of the decision involved herein, every Circuit which had had occasion to pass upon the Board's "right to control" test as a *per se* determinant of a violation had rejected it.[7] The last Circuit, (Ninth) to reject the doctrine issued its opinion on July 21, 1971. In *Local 8, Bricklayers* v. *NLRB,* —— F. 2d ——, (C.A. 9, July 21, 1971) (77 LRRM 3023), the Ninth Circuit held that "the Board's singular reliance upon right to control is improper and should be abandoned." The Ninth Circuit noted the *National Woodwork* decision and agreed that a determination of whether union activity is primary (hence legal) or proscribed secondary activity requires an analysis of the "surrounding circumstances" and that the issue of "control" can only be one of those circumstances—"it cannot be the sole determinative factor in a controversy of this type."[8]

In the present case, the Board adopted all of the Trial Examiner's factual findings pointing to the Union's work

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7. The instant Court of Appeals had in a case earlier to the present one also rejected the *per se* "right to control" doctrine. *Local 636, Plumbers* v. *NLRB,* 430 F. 2d 906 (C.A. D.C., 1970). The Board on remand of the case (177 NLRB No. 14, April 8, 1971) examined the circumstances of the union's claim that it was engaged in legitimate work preservation activity, concluded that it was engaged in legitimate primary activity and dismissed the complaint. The Board decision in footnote 3 noted that Member Brown, who has expressed his rejection of the "right to control" doctrine since its inception, would accept the lower court's determination in this case for all purposes".

8. The Ninth Circuit pointed out that the application of the "right to control" test in that case produced the "anomalous result" that instead of picketing the employers (sub-contractors) with whom the Union had a dispute thus being limited to the common situs picketing rules, instead the union would have to picket the general contractor and shut down the entire project when the dispute involved only a very limited portion.

preservation objective but it nevertheless merely held, contrary to the Trial Examiner, that because of architectural specifications, Simmons had no "control" and *ergo*, Simmons had to be classified as a "neutral." In *National Woodwork* this Court analyzed all of the provisions of the Act which might bear upon the subject matter in an effort to accommodate section 7 which generated rights for employees, section 13 which guaranteed the preservation of the right to strike and the proviso to section 8 (b) (4) (B) which provided that the section should not be construed to make unlawful, where not otherwise unlawful, any primary strike or picketing.

Simmons, still searching for a ground—however strained—to have this Court invoke its discretion to issue a writ of certiorari argues that the Court of Appeals decision is somehow novel in that the collective bargaining agreement here in question did not contain what Simmons calls "a specific work preservation agreement" (Petitioner's brief, pg. 12). What Simmons seeks is to impose still another *per se* determinant of a violation which even the Board in its memorandum to this Court rejects. The Board admits that factual findings have already been made that the preparation of the doors for hanging was traditional and historical bargaining unit work and that "the only circumstance which evidences the Union's secondary object" is the "right to control" (Board's Memorandum, pg. 3, fn. 1). The Board did not request the Solicitor General to file a petition in the present case because he recently declined to file a petition in the earlier decision of the instant Court of Appeals (*Local 636, Plumbers*) rejecting the "right to control" test. There, even though a "specific" work preservation clause was involved, the Solicitor General felt that the Court was correct in remanding the case to the Board for a factual

determination as to whether the work in dispute there was historical unit work and that "there was little likelihood that the Court would uphold the Board's position . . ." (Solicitor General's Memorandum, pg. 3).

As regards the necessity of a "specific" work preservation clause the Court of Appeals stated that "If the presence or absence of a specific work preservation clause is to make a difference it can only be as one of the many 'surrounding circumstances' used to determine what the 'union's objective' was." (App. 16a). Contrary to the unsupported viewpoint of Simmons no such specific clause is necessary to engage in primary activity to protect against the loss of bargaining unit work. Were it otherwise, no union could ever engage in primary activity to secure a clause to protect its bargaining unit work if they first had to have a clause to engage in such activity. And, clearly, a union has the right to negotiate for such a clause and to engage in primary activity to secure same. *Fibreboard Paper Products Corp.* v. *NLRB,* 379 U.S. 203 (1964). In *Carpenters District Council* v. *NLRB,* 398 F. 2d 11 (C.A. 8, 1968) the Eighth Circuit refused to enforce the Board's finding of a violation of Section 8 (b) (4) (B) where the Board failed to consider the union's contention that its sole object was to protest the loss of traditional bargaining unit work. The Court there stated that "where the primary object of the strike is the preservation of traditional union work . . . such pressure is not proscribed" but it also held that "without a right based upon contract *or area practice,* there may well be support for the Board's finding" (Italics supplied). The Court accordingly remanded the case to the Board for an examination of the area practice to determine whether the union's object was to protect its traditional work. It

is interesting to note that the Board on remand of the *Local 636* case dismissed it after examining the union's historical and traditional work. As long as the work involved was "historical and traditional bargaining unit work," the Board has never questioned a union's right to preserve it (absent its automatic "right to control" doctrine). The Board has never required or even suggested that the bargaining unit work be spelled out in specific detail. In fact, in its response to this Court in the instant matter it admits that "Since the Examiner found that preparatory work on the doors was 'historical and traditional unit work of carpenters at the jobsite' (Pet. App. 49a), the *only* circumstance which evidences the Union's secondary object is that Simmons lacked the 'right to control' the work in dispute." (Solicitor General's Memorandum, pg. 3, fn. 1). (Italics supplied).

Brief comment should perhaps be made regarding Simmons argument that this Court should reverse its decision in *National Woodwork*.[9] Simmons erroneously argues that *National Woodwork* is a *carte blanche* invitation for unions to engage in secondary boycotts at will and it

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9. Simmons also argues that a Union's right to engage in primary work preservation activity has caused a "catastrophic" economic impact. So "catastrophic" was the economic impact upon Simmons in this case that the Trial Examiner, reviewing the facts, found that Simmons, by changing from job site prepared to premachined doors reaped a "financial bonanza" of $14,000.00 (App. 46a). And even apart from that, while we disagree with Simmons' bare assertion, even if such an argument was relevant, this Court has previously answered it in *National Woodwork*. In rejecting asserted economic and technological reasons, this Court stated "Those arguments are addressed to the wrong branch of government. Congress has demonstrated its capacity to adjust the Nation's labor legislation to what, in its legislative judgment, constitutes the statutory pattern appropriate to the developing state of labor relations in the country."

states that the decision "has repealed Section 8 (b) (4) of the Act." (Petitioner's brief, pg. 17). Rather than "repeal Section 8 (b) (4)," *National Woodwork,* for the first time, analyzed the crucial primary-secondary distinctions in determining whether a violation had occurred and gave the Board and lower courts direction to examine all surrounding circumstances in factually determining whether there was a proscribed secondary objective. In *National Woodwork* this Court interpreted Section 8 (b) (4) (B) as part of an integrated harmonious Act which regulates and gives protection not only to the labor relations of both union and management but the public, as well. What Simmons, in actuality, seeks to do by its attack on *National Woodwork* is to judicially repeal the right of a union to engage in concerted primary activity to protect wages, hours and working conditions—a right given by Congress and one which this Court has consistently upheld.[10]

Simmons, not the Board, seeks certiorari. The Board itself is divided on the appropriateness of the doctrine.[11] Five Circuits have considered the doctrine and all have rejected it. Even the Solicitor General agrees with the rejection. The petition presents no novel question. It should be denied.

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10. *NLRB* v. *International Rice Milling Co.,* 341 U.S. 665 (1951); *NLRB* v. *Local 639, Teamsters,* 362 U.S. 274 (1960); *NLRB* v. *Mastro Plastics Corp.,* 350 U.S. 270 (1956).

11. See fn. 7, *supra.*

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied. The United Brotherhood of Carpenters and Joiners of America, the International Union of the instant local union respondent, joins in this brief.

Respectfully submitted,

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